Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, & 15-191

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In The Supreme Court of the United States

DAVID A. ZUBIK, ET AL., *Petitioners,*
v.
SYLVIA BURWELL, ET AL., *Respondents.*

PRIESTS FOR LIFE, ET AL., *Petitioners,*
v.
DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.
Respondents.

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, ET AL.,
Petitioners,
v.
SYLVIA BURWELL, ET AL., *Respondents.*

Additional Case Captions Listed on Inside Front Cover

On Writs of Certiorari to the United States Courts of Appeals for the Third, Fifth, Tenth, and D.C. Circuits

BRIEF OF *AMICI CURIAE* ACNA JURISDICTION OF THE ARMED FORCES AND CHAPLAINCY AND AVE MARIA UNIVERSITY IN SUPPORT OF PETITIONERS

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EAST TEXAS BAPTIST UNIVERSITY, ET AL., *Petitioners,*

v.

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LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO, ET AL., *Petitioners,*

v.

SYLVIA BURWELL, ET AL., *Respondents.*

SOUTHERN NAZARENE UNIVERSITY, ET AL., *Petitioners,*

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INTERESTS OF AMICI[1]

The Anglican Church in North America (ACNA) Jurisdiction of the Armed Forces and Chaplaincy is part of the Anglican Communion, the world's third largest Christian communion with over 85 million members. ACNA's endorser, Bishop Derek Jones, is a retired U.S. Air Force officer and decorated fighter pilot who served for 27 years and helped lead the development of the joint military religious affairs doctrine.

Ave Maria University ("AMU") was founded in 2003 in fidelity to Christ and His Church in response to the call of Vatican II for greater lay witness in contemporary society. AMU exists to further teaching, research, and learning at the undergraduate and graduate levels in the abiding tradition of Catholic thought in both national and international settings.

The *amici curiae* are organizations with extensive experience concerning the free exercise of religion in the United States. ACNA Jurisdiction of the Armed Forces and Chaplaincy maintains an ongoing relationship with the military and is responsible for certifying individual chaplains for military service. AMU, as a leading Catholic

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[1] The parties have consented to the filing of this brief. As required by Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and that the only person other than the *amici* and their counsel who made any monetary contribution intended to fund the preparation or submission of this brief is Robert Gallagher, who is the Chief Executive Officer of Good Will Publishers, Inc.

University, has a direct interest in protecting the principle and practice of religious liberty as manifest in the present action. Both *amici curiae* believe that their experience in respecting and promoting the free exercise of religion through their religious, civic, and educational work will provide this Court with an important perspective on the substantial burden analysis under the Religious Freedom Restoration Act ("RFRA").

SUMMARY OF ARGUMENT

The lower courts have seriously misconstrued RFRA's substantial burden analysis and arrogated the authority to tell religious believers when government-mandated actions actually contravene their sincerely held beliefs. *See Geneva Coll. v. Sec'y U.S. Dep't of Health and Human Servs.*, 778 F.3d 422, 442 (3d Cir. 2015) ("[N]ow that we have dispelled the notion that the self-certification procedure is burdensome, we need not consider whether the burden is substantial."). Specifically, these courts have informed the religious nonprofit organizations (the "religious nonprofits" or "petitioners") that, because the Patient Protection and Affordable Care Act (the "ACA") is the legal cause of the obligation of third-party administrators ("TPAs") and insurance issuers to provide contraceptive coverage, giving notice under the accommodation at issue in these consolidated cases (the "Accommodation") does not make the petitioners complicit in immoral conduct—despite their sincere belief to the contrary that such notice enables and facilitates the provision of contraceptive and sterilization services. By resolving the legal question (whether the ACA is

the legal cause of contraceptive coverage), the lower courts claim to obviate the moral question (whether giving notice makes a religious adherent complicit in sin). On this view, instead of looking to the tenets of their faith or their religious leaders, religious nonprofits must look to the courts to determine if a government-mandated action "washes [their] hands of any involvement" in wrongdoing. *Id.* at 441 (internal punctuation and citation omitted).

Not surprisingly, there are at least two fundamental problems with permitting courts to tell religious adherents what does or does not violate their moral and religious beliefs. First, this view is inconsistent with the substantial burden analysis under RFRA, which focuses on the force or pressure that the government places on a religious believer. As this Court explained in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) and *Holt v. Hobbs*, 135 S. Ct. 853 (2015), the government substantially burdens the exercise of religion when it puts a religious adherent to the choice of either (1) following the government's directive and engaging in conduct that violates her sincerely held religious beliefs or (2) contravening that directive and facing significant penalties (as in *Hobby Lobby*) or discipline (as in *Holt*). *See Id.* at 862. Because (i) it is undisputed that giving notice contravenes the petitioners' sincerely held religious beliefs (that such notice facilitates the provision of contraceptive services by authorizing the use of their healthcare information and infrastructure) and (ii) the petitioners face the same penalties under the ACA as Hobby Lobby and Conestoga if the petitioners do not give notice under the

Accommodation, the Accommodation imposes a substantial burden on the religious nonprofits' exercise of religion.

Second, the lower courts impermissibly conflate the legal and religious realms, assuming the power to tell religious adherents that their sincerely held beliefs about moral complicity are wrong. This Court has, "[r]epeatedly and in many different contexts, ... warned that courts must not presume to determine ... the plausibility of a religious claim," *Emp't Div., Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872, 887 (1990), or "in effect tell the plaintiffs that their beliefs are flawed." *Hobby Lobby*, 134 S. Ct. at 2778. But that is precisely what the lower courts have done in these cases.

Although federal courts have the duty to resolve legal questions, they have no authority in the religious and moral realm. For many religious believers, St. Thomas More's words ring true: "I am the King's good servant, but God's first." While courts are free to explain whether something is a legal cause, for petitioners only God (through a religious authority determined in accordance with their sincere religious beliefs) can determine whether an action makes them complicit in sin. Accordingly, this "question" about moral complicity is one "that the federal courts have no business addressing." *Id.*

ARGUMENT

I. The Lower Courts Fundamentally Misconstrue RFRA's Substantial Burden Analysis and, in the Process, Usurp the Right of Religious Adherents to Determine Their Own Views Regarding Moral Complicity.

RFRA was passed "to provide very broad protection for religious liberty." *Id.* at 2760. Congress defined "religious exercise" expansively to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A) (2012). Congress also specified that this concept "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." *Id.* at § 2000cc-3(g). Following Congress's mandate, this Court has interpreted the "exercise of religion" to "involve[] 'not only belief and profession but the performance of (or abstention from) physical acts' that are 'engaged in for religious reasons.'" *Hobby Lobby*, 134 S. Ct. at 2770 (quoting *Smith*, 494 U.S. at 877).

Under RFRA, the plaintiff has the burden of "showing that the relevant exercise of religion is grounded in a sincerely held religious belief" and that the government's "policy substantially burdened that exercise of religion." *Holt*, 135 S. Ct. at 862. Consistent with Congress's directives, courts generally do not dispute the sincerity of a

petitioner's religious belief.[2] And none of the lower courts have questioned the sincerity of the petitioners' religious beliefs.

Disregarding Congress's and this Court's instruction that RFRA applies broadly to "any exercise of religion," the lower courts have concluded that the Accommodation does not burden, let alone substantially burden, the plaintiffs' sincerely held religious belief that providing notice under the Accommodation makes them complicit in a grave moral wrong. These courts have offered two related justifications for this conclusion. First, they contend that federal law (*i.e.*, the ACA), not the notice under the Accommodation, creates the legal obligation of insurers and TPAs to provide contraceptive coverage. Consequently, the petitioners are not responsible for—and, therefore, their religious beliefs are not implicated by—their employees' receiving contraception and sterilization services through the religious nonprofits' insurance providers or TPAs. Second, the Accommodation is just that, an accommodation that is intended to remove the substantial burden of complying with

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[2] Although courts frequently defer to a religious adherent's claim that a belief is sincerely held, that deference is not absolute. As this Court stated in *Hobby Lobby*, "a pretextual assertion of a religious belief in order to obtain an exemption for financial reasons would fail." 134 S. Ct. at 2774 n.28. Similarly, this Court acknowledged that "by the time of RLUIPA's enactment, the propensity of some prisoners to assert claims of dubious sincerity was well documented." *Id.* at 2774.

the ACA. According to the lower courts, giving notice under the Accommodation serves as "a declaration that [the religious nonprofits] will *not be complicit* in providing coverage" and consequently "does not necessitate any action that interferes with the appellees' religious activities." *Geneva Coll.*, 778 F.3d at 439.

By focusing exclusively on the legal cause of the provision of contraceptive and sterilization services, the lower courts make the same mistake that the Department of Health and Human Services made in *Hobby Lobby*: they obfuscate the central question under RFRA's substantial burden analysis ("whether the [Accommodation] imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with *their religious beliefs*") and then proceed to answer a different question ("whether the religious belief asserted in a RFRA case is reasonable"). *Hobby Lobby*, 134 S. Ct. at 2778 (emphasis in the original).

Under *Hobby Lobby*, though, the answer to the first (and only proper) question is unequivocally "yes." Under the ACA, religious nonprofits must either (i) provide coverage for all FDA-approved contraceptives and sterilization procedures (which would violate their sincerely held religious beliefs), (ii) give notice under the Accommodation (which also would violate their sincere beliefs), or (iii) pay the significant penalties imposed for noncompliance. Under *Hobby Lobby* and *Holt*, putting petitioners to this choice substantially burdens their religious exercise.

A. Religious Beliefs Are Substantially Burdened under RFRA If the Government Forces an Adherent to Choose between Complying with a Law that Violates His Religious Beliefs and Facing Serious Penalties If He Follows His Faith.

Given the broad protection afforded the exercise of religion under RFRA, the substantiality of a burden is determined by the level of force the government applies to get a religious believer to contravene his religious beliefs, not a court's independent determination that a law's requirements are or are not *actually* consistent with his professed religious beliefs. As *Hobby Lobby* and *Holt* instruct, a substantial burden arises when the government puts a religious nonprofit to the choice of either "'engag[ing] in conduct that seriously violates [its] religious beliefs' ... [or] fac[ing] serious disciplinary action" or penalties for violating the government's directive. *Holt*, 135 S. Ct. at 862 (quoting *Hobby Lobby*, 134 S. Ct. at 2775); *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981) (finding a substantial burden when the government places "substantial pressure on an adherent to modify *his* behavior and to violate *his* beliefs") (emphasis added).[3] Rather than assess the compatibility of

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[3] *See also Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (finding a "clear" burden where the state supreme court's "ruling forces [a religious adherent] to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her

the asserted beliefs and the law at issue, courts are limited to deciding whether the government places substantial pressure on the religious objector to violate those beliefs. Under RFRA, the religious adherent gets to define the nature of his own sincerely held beliefs as well as what constitutes a violation of those beliefs. Hence, the proper question under RFRA is "whether the HHS mandate imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with *their religious beliefs*." *Hobby Lobby*, 134 S. Ct. at 2778; *see also Thomas*, 450 U.S. at 715 (reversing the state supreme court, which denied benefits based on concern over the line the employee drew between work that he found to be consistent with his religious beliefs and work that he found to be morally objectionable, because "it is not for us to say that the line he drew was an unreasonable one"). Courts can consider the degree of force the government used to ensure compliance (*i.e.*, whether the government imposed a

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religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship."); *Wisconsin v. Yoder*, 406 U.S. 205, 217 (1972) (concluding that Wisconsin's compulsory-attendance law imposed a severe burden on the Amish plaintiffs because it "affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs").

substantial burden), but they cannot decide whether the required action actually interferes with the *petitioners'* asserted religious beliefs.

Applying this standard in *Holt*, this Court found that the plaintiff "easily satisfied" his burden. Because the Arkansas Department of Corrections required that the prisoner either shave his beard, which would violate his sincerely held religious beliefs, or follow his religious beliefs and "face serious disciplinary action," this Court unanimously concluded that the government policy "substantially burdens his religious exercise." *Holt*, 135 S. Ct. at 862. Similarly, in *Hobby Lobby*, this Court held that the contraceptive mandate imposed a substantial burden on the closely held corporations "[b]ecause the contraceptive mandate forces them to pay an enormous sum of money ... if they insist on providing insurance coverage in accordance with their religious beliefs." *Hobby Lobby*, 134 S. Ct. at 2779. Given that no one questioned the sincerity of the closely held corporations' beliefs (that providing coverage for abortifacients was immoral) and that the penalties under the ACA for not providing such coverage "are surely substantial," this Court had "little trouble concluding" that "the HHS contraceptive mandate 'substantially burden[s]' the exercise of religion." *Id.* at 2775-76, 2759 ("If these consequences do not amount to a substantial burden, it is hard to see what would.").

In the wake of *Hobby Lobby* and *Holt*, the religious nonprofit cases also present "little trouble." There is no question that, if the religious nonprofits do not give notice under the Accommodation (or provide contraceptive coverage

directly), they will be subject to the same "substantial" penalties that Hobby Lobby and Conestoga faced. When religious adherents are put to such a choice, *Hobby Lobby* instructs that the courts' "'narrow function ... is to determine' whether the line drawn reflects 'an honest conviction,'" *Id.* at 2779 (quoting *Thomas*, 450 U.S. at 716). Courts are restricted to considering only the petitioners' sincerity or "honest conviction" because courts are precluded from evaluating the veracity, consistency, or reasonableness of religious beliefs. *See Thomas*, 450 U.S. at 714 ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."). But given that the lower courts do not question the sincerity of the petitioners' belief (that providing the required notice would make them complicit in serious wrongdoing), "there is no dispute that it does" reflect an honest conviction. *Hobby* Lobby, 134 S. Ct. at 2779. Thus, the Accommodation substantially burdens the religious beliefs of nonprofit organizations, such as the Little Sisters of the Poor and Priests for Life.

The lower courts avoid this conclusion only by mischaracterizing the religious nonprofits' objection to the Accommodation. According to the lower courts, the religious nonprofits object to the provision of contraceptive services generally (even if done by third parties) and not to the *de minimis* act of signing a form. *Catholic Health Care Sys. v. Burwell*, 796 F.3d 207, 222 (2d Cir. 2015) ("Courts have not found a substantial burden where a plaintiff argues that her religious exercise is violated by the government's internal operations or,

by extension, its decision to burden third parties, even where the plaintiff plays a precipitating role."); *Priests for Life v. U.S. Dep't of Health and Human Servs.*, 772 F.3d 229, 246 (D.C. Cir. 2014) ("An asserted burden is ... not an actionable substantial burden when it falls on a third party, not the religious adherent."); *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1181 (10th Cir. 2015) ("Because federal law requires the health insurance issuer to provide coverage and the accommodation process removes an objecting organization from participating, plaintiffs with insured plans fail to show the accommodation burdens their religious exercise."); *Id.* at 1192 ("Plaintiffs are not substantially burdened solely by the *de minimis* administrative tasks this involves.").

Although many religious believers disagree with the government's requiring employers to provide coverage for all FDA-approved contraception and sterilization procedures, that is not the basis for the petitioners' objection to the Accommodation. Rather, they object to the government's coercing religious organizations to provide specific information (either through EBSA Form 700 or directly to HHS) that they sincerely believe violates the tenets of their faith by authorizing the ongoing use of their healthcare information and infrastructure, which, in turn, results in the provision of contraceptive and sterilization services.[4] That is, as in *Hobby Lobby*, "the

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[4] That signing the self-certification form is more than a simple *de minimis* administrative task without legal or moral effect is apparent from the

plaintiffs do assert that [signing the notice] violates their religious beliefs, and [the courts] do[] not question their sincerity." 134 S. Ct. at 2779.

Under RFRA, the key is that the religious nonprofits have "articulated a *religious* objection to the [Accommodation]." *Id.* at 2779. This fact distinguishes the religious nonprofit cases from situations where the plaintiffs failed to articulate a religious objection to the required action. *See Tilton v. Richardson*, 403 U.S. 672, 689 (1971) (plurality) (rejecting a claim that the use of general tax revenue to subsidize the secular activities of religious institutions violated the free exercise clause because plaintiffs were "unable to identify any coercion directed at the practice or exercise of

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government's claim that the required information is "the minimum information necessary ... to determine which entities are covered by the accommodation, to administer the accommodation, and to implement" the government's policy. 79 Fed. Reg. 51,092, 51,095 (Aug. 27, 2014); 80 Fed. Reg. 41,318, 41,323 (July 14, 2015). Self-certification authorizes a third-party to effectively co-opt the petitioners' plan and to use their healthcare information and infrastructure to provide coverage for services that violate their religious beliefs. As Judge Kavanaugh aptly put the point in his *Priests for Life* dissent, "[a]fter all, if the form were meaningless, why would the Government require it?" *Priests for Life v. U.S. Dep't of Health and Human Servs.*, No. 1:13-cv-01261, 2015 WL 5692512 at *17 (D.C. Cir. May 20, 2015) (Kavanaugh, J., dissenting from denial of rehearing en banc).

their religious beliefs"); *Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 249 (1968) ("[A]ppellants have not contended that the New York law in any way coerces them as individuals in the practice of their religion.").

The petitioners' specific religious objection to the notice requirement also shows why the Third Circuit's reliance on *Bowen v. Roy*, 476 U.S. 693 (1986), *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), and *Kaemmerling* v. *Lappin*, 553 F.3d 669 (D.C. Cir. 2008) to "confirm that [courts] can, indeed should, examine the nature and degree of the asserted burden to decide whether it amounts to a substantial burden under RFRA" is misplaced. 778 F.3d at 441. None of these cases involves the situation where, as here, the government coerces individuals to take (or refrain from taking) a specific action that contradicts (or is required by) their sincerely held religious beliefs. *See Bowen*, 476 U.S. at 703 (stating that "in no sense does [the Social Security requirement] affirmatively compel appellees, by threat of sanctions, to refrain from religiously motivated conduct or to engage in conduct that they find objectionable for religious reasons"); *Lyng*, 485 U.S. at 450-51 (refusing to apply strict scrutiny to a free exercise claim where the government programs "have no tendency to coerce individuals into acting contrary to their religious beliefs"); *Kaemmerling*, 553 F.3d at 679 (denying that the government's extraction and use of DNA information violated the plaintiff's free exercise rights because the government program did not require him "to modify his religious behavior in any way—it involves no action or forbearance on his

part, nor does it otherwise interfere with any religious act in which he engages").

The conscientious objector example discussed in *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 623 (2015) (Hamilton, J., concurring) and *Little Sisters of the Poor*, 794 at 1183-84 suffers from the same problem and, therefore, is inapposite. In his *Notre Dame* concurrence, Judge Hamilton invokes a conscientious objector to show why the Accommodation does not substantially burden petitioners' religious beliefs. According to Judge Hamilton, a conscientious objector, having been relieved of his duty to serve, cannot complain when the government drafts someone else in his place. Even if the objector sincerely believes that "he will be morally responsible" and "his religious exercise will be substantially burdened" if someone is substituted for him, RFRA does not permit him to be exempted *and* to preclude the government's drafting a substitute. *Univ. of Notre Dame*, 786 F.3d at 623 (Hamilton, J., concurring) The religious nonprofits, so the argument goes, make the same claim—they object to the government's finding a substitute to provide the required contraceptive and sterilization coverage even though the Accommodation enables them to opt-out of providing such coverage.

The problem, however, is that an accommodation removes a substantial burden only if it actually accommodates the particular adherent's sincerely held religious beliefs. *See Holt*, 135 S. Ct. at 862-63 (explaining that "the protection of RLUIPA ... is 'not limited to beliefs which are shared by all of the members of a religious sect'") (quoting *Thomas*, 450 U.S. at 715-16). In Judge Hamilton's hypothetical, the

exemption from service accommodates the religious objector because he does not have to take an action (serving in the military) that violates his religious beliefs. The draft exemption does not require him to take any further actions and, consequently, does not infringe on the exercise of his religious beliefs. That is, in the words of *Bowen*, the draft exemption does not "affirmatively compel [conscientious objectors], by threat of sanctions, to refrain from religiously motivated conduct or to engage in conduct that they find objectionable for religious reasons." *Bowen*, 476 U.S. at 703. A person may object to war generally, but such a general disagreement with government policy does not "identify any coercion directed at the practice or exercise of [his] religious beliefs." *Tilton*, 403 U.S. at 689.

The religious nonprofits, though, are in a very different position. Under the Accommodation, the government does not simply go out and find a substitute to provide contraception and sterilization coverage; rather, the government requires the petitioners to take a specific action that identifies the substitute that will provide the objectionable coverage to exactly those individuals whom the nonprofits refused to cover for religious reasons. But providing this notice violates the petitioners' sincerely held religious beliefs. As a result, the conscientious objector example provides an apt analogy only if the government requires the person receiving the draft exemption either to identify specific individuals in his community who could serve as a substitute (and the objector has a sincere religious belief that precludes his doing so) or to suffer disciplinary action (such as a fine or

incarceration) if he refuses to identify possible substitutes. Although the government has a right to draft a substitute, it has no right to coerce conscientious objectors to take an action that substantially burdens their sincerely held religious belief (unless, of course, the government can satisfy strict scrutiny).

The analogy breaks down even more when one considers the petitioners' claim that providing notice under the Accommodation also forces them to support indefinitely the substitute's conduct by maintaining its health plan, the infrastructure of which the substitute employs to distribute contraceptives to the petitioners' employees. *See* JA 1220-21 (stating that Petitioner Guidestone's TPA would facilitate abortifiacient coverage by using its plan infrastructure to contact plan participants, identify participants by "payroll location," and perform "[o]ngoing , nightly feeds" of information). Thus, to be analogous, in addition to supplying possible names of the substitute, the conscientious objector would have to maintain an ongoing relationship with his substitute, providing information and logistical support related to the substitute's military service.

The fact that the draft act might be the legal cause of a substitute's being drafted does not remove the moral complicity of one who sincerely believes that identifying (and continuing to support) eligible substitutes violates his religious beliefs. Moreover, focusing on the legal cause serves to shift the attention away from the primary question under RFRA's substantial burden prong—whether the government imposes a substantial burden on religious adherents who refuse to take a

government-mandated action that conflicts with *their* sincerely held religious beliefs. In the conscientious objector example, the answer is "no" because the objector need not take any additional action. In the present cases, the answer is "yes" because giving notice (*i.e.*, taking an action that they sincerely believe facilitates and enables the use of their plan to provide contraceptives and abortifacients) contravenes petitioners' beliefs and they will have to pay "an enormous sum of money" if they refuse. *Hobby Lobby*, 134 S. Ct. at 2779; *Sherbert*, 450 U.S. at 717-18 ("Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, ... thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.").

B. Deferring to a Religious Adherent's Sincere Beliefs and Claims about What Burdens Those Beliefs Does Not Conflate the Plaintiff's Burdens under RFRA.

The government and the lower courts address the wrong question ("whether the religious belief asserted in a RFRA case is reasonable"), *Hobby Lobby*, 134 S. Ct. at 2778, because they misunderstand the burden-shifting framework under RFRA. While the lower courts readily defer to a petitioner's characterization of its religious beliefs, *see Priests for Life*, 772 F.3d at 247 ("Plaintiffs are correct that they—and not this Court—determine what religious observance their

faith commands."), they reject the religious adherent's claim that the Accommodation's notice provision contravenes those beliefs. According to the lower courts, even though a court must "accept[] a litigant's sincerely held religious beliefs, it must assess the nature of a claimed burden on religious exercise to determine whether, as an objective legal matter, that burden is 'substantial' under RFRA." *Catholic Health Care Sys.*, 796 F.3d at 217; *Geneva Coll.*, 778 F.3d at 442 (concluding that because the court "dispelled the notion that the self-certification procedure is burdensome, we need not consider whether the burden is substantial"). To defer to a petitioner's claim that a law substantially burdens its exercise of religion would collapse the substantial burden inquiry into the sincerity of belief inquiry, permitting religious adherents to trigger strict scrutiny review of any federal law or policy. *See Catholic Health Care Sys.*, 796 F.3d at 218 ("If RFRA plaintiffs needed only to assert that their religious beliefs were substantially burdened, federal courts would be reduced to rubber stamps, and the government would have to defend innumerable actions under demanding strict scrutiny analysis."); *Little Sisters of the Poor*, 794 F.3d at 1176 ("[A]ccepting any burden alleged by Plaintiffs as 'substantial' would improperly conflate the determination that a religious belief is sincerely held with the determination that a law or policy substantially burdens religious exercise.").

What the lower courts fail to appreciate is that under this Court's religious exercise cases, a religious objector has the burden to show three things: (i) that she has a sincere religious belief,

(ii) that the government is requiring the adherent to take an action that she sincerely believes contravenes her religious belief, and (iii) that the government is coercing or forcing her to take that action, thereby imposing a "substantial" burden on her religious exercise. In *Hobby Lobby*, the Greens and the Hans sincerely believed that (i) "life begins at conception" and (ii) "it would violate their religion to facilitate access to contraceptive drugs or devices that operate after that point." *Hobby Lobby*, 134 S. Ct. at 2766. This Court expressly held that "it is not for us to say that their religious beliefs are mistaken or insubstantial." *Id.* at 2779. That is, contrary to the lower courts' analysis, this Court refused to say that their religious views were wrong (that life began sometime after conception) or that providing insurance coverage did not contradict or burden their beliefs. Instead, this Court deferred to the plaintiffs' expressed beliefs (stating that there was "no dispute" that they had an "honest conviction") and concluded that the ACA imposed a substantial burden because the penalties under the ACA "force[d] them to pay an enormous sum of money" if they adhered to their sincere religious beliefs. *Id.*

The closely held companies in *Hobby Lobby* drew the "burden" line at providing coverage for contraceptives that they believed functioned as abortifacients. The petitioners, however, draw the line more broadly to also include giving notice under the Accommodation. They sincerely believe both that (i) providing, facilitating, or enabling coverage for contraceptive and sterilization services (either directly or through their insurance issuers or TPAs) is morally wrong and (ii) giving the notice

under the Accommodation makes them morally complicit in providing such coverage. Under this Court's RFRA analysis, though, courts cannot decide whether petitioners' sincere belief (that giving notice "lies on the forbidden side of the line") is "mistaken or insubstantial." *Id.*[5] All courts are authorized to do is to decide whether the federal law or policy imposes a substantial burden that effectively forces religious adherents to take an action that they sincerely believe is sinful.

Yet deferring to religious objectors regarding the sincerity of their religious beliefs as well as whether a required action burdens those beliefs neither conflates the sincere belief and substantial burden inquiries nor subjects all federal policies to strict scrutiny. Courts still must determine (a) whether the petitioners are asserting a sincere religious belief or a mere pretext, *see Yoder*, 406 U.S. at 215 ("A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; ... the claims must be rooted in religious belief") and *Hobby Lobby*, 134 S. Ct. at 2774 (noting that "a corporation's pretextual assertion of a religious belief in order to obtain an exemption for financial

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[5] *See also Welsh v. United States*, 398 U.S. 333, 339 (1970) (explaining in the conscientious objector context that "religious beliefs" include beliefs that are "'intensely personal' convictions which some might find 'incomprehensible' or 'incorrect'" and that "impose upon him a duty of conscience to refrain from participating in" the action mandated by the government).

reasons would fail"); (b) whether the government is requiring the petitioners to take an action that burdens their exercise of religion, *see Tilton*, 403 U.S. at 689 (rejecting plaintiffs' free exercise claims because they were "unable to identify any coercion directed at the practice or exercise of their religious beliefs") and *Lyng*, 485 U.S. at 451 (requiring plaintiffs to show that a government program has a "tendency to coerce individuals into acting contrary to their religious beliefs" to trigger strict scrutiny); and (c) whether the consequences for not taking the required action constitute a substantial burden. *Holt*, 135 S. Ct. at 862 (concluding that a prisoner, who showed that he was required to shave his beard in violation of his sincere religious beliefs or "face serious disciplinary action," "easily satisfied [his] obligation" to establish a substantial burden). Accordingly, deferring to petitioners does not obviate the role of the courts under RFRA's burden-shifting framework; rather, it ensures that courts will not do what the lower courts did in the current cases—tell religious plaintiffs that their beliefs about what constitutes sinful action are wrong, unreasonable, or misguided.

Moreover, this deference is wholly consistent with the deference given to plaintiffs in the First Amendment expressive association context. In *Boy Scouts of Am. v. Dale*, the Boy Scouts claimed that New Jersey's public accommodations law, which the New Jersey Supreme Court interpreted to require the Boy Scouts to readmit a scout leader who was "an avowed homosexual and gay rights activist," violated the Boy Scouts' right of expressive association. 530 U.S. 640, 644 (2000). Foreshadowing the lower courts' reasoning in the

present cases, the New Jersey Supreme Court concluded "that Dale's membership does not violate the Boy Scouts' right of expressive association because his inclusion would not 'affect in any significant way [the Boy Scouts'] existing members' ability to carry out their various purposes.'" 734 A.2d 1196, 1225, (N.J. 1999) (quoting *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 437, 548 (1987)).

On appeal, this Court clarified the standard for forced association claims: "The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." *Dale*, 530 U.S. at 648. Under this standard, courts must consider two things: (i) "whether the group engages in 'expressive association,'" and (ii) "whether the forced inclusion of Dale ... would significantly affect the Boy Scouts' ability to advocate public or private viewpoints." *Id.* at 648, 650. Because the Boy Scouts sought to convey a system of values, it was "indisputable that [the Boy Scouts] engages in expressive activity." *Id.*

Turning to the second prong, this Court split the significant burden inquiry into two subparts: (a) whether the Boy Scouts expressed a view about homosexuality and, if so, (b) "whether Dale's presence as an assistant scoutmaster would significantly burden the Boy Scouts' desire to not 'promote homosexual conduct as a legitimate form of behavior.'" *Id.* at 653 (citation omitted). The state supreme court looked beyond the Boy Scouts' expressed views on homosexuality and determined

that the exclusion of members based on sexual orientation actually was "inconsistent" with the organization's commitment to a "diverse and representative membership" and "appear[ed] antithetical to the organization's goals and philosophy." *Id.* at 650-51 (internal punctuation and citations omitted).

This Court, consistent with its reasoning in *Hobby Lobby*, rejected the New Jersey Supreme Court's analysis and disclaimed the ability "of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent." *Id.* at 651. And in support of this position, *Dale* expressly invoked *Thomas*'s admonition that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." 450 U.S. at 714. When evaluating "the sincerity of the professed beliefs," the "limited extent" of the Court's inquiry required it to defer to the organization's professed beliefs: "We accept the Boy Scouts' assertion. We need not inquire further to determine the nature of the Boy Scouts' expression with respect to homosexuality." *Id.* at 650-51.

Moreover, this Court gave the same level of deference to the Boy Scouts' expressed views when deciding whether the forced inclusion of Dale would significantly burden its message regarding homosexuality: "As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression." *Id.* at 653. The members of an expressive association, like the members of a

religious group, have a "right to choose to send one message but not another." *Id.* at 655. Such deference is important in the speech and free exercise contexts because it prevents courts from substituting their views (about social issues or religious beliefs) for the professed beliefs of the organization. As a result, given that New Jersey's public accommodations law would force the Boy Scouts to alter its message, this Court held that "the forced inclusion of Dale would significantly affect its expression." *Id.* at 656.

In *Democratic Party of the United States v. Wisconsin ex rel. La Follette*, this Court mandated the same level of deference to an association's rules for seating delegates at its national convention. 450 U.S. 107 (1981). The State of Wisconsin passed a law that opened its Democratic Presidential preference primary to all voters, even those who did not publicly declare their party affiliation. This by itself did not violate the right of association of the Democratic Party of the United States (the "National Party"). But Wisconsin also sought to require the National Party to honor the binding primary results and to seat the Wisconsin delegation at the National Party's national convention, even though Wisconsin's delegates were chosen in a way that violated the National Party's rules. On appeal, Wisconsin argued that its open primary law "places only a minor burden on the National Party." *Id.* at 123. The National Party, in response, contended "that the burden is substantial, because it prevents the Party from 'screen[ing] out those whose affiliation is ... slight, tenuous, or fleeting,' and that such screening is essential to build a more effective and responsible

Party." *Id.* Instead of entering the fray and objectively assessing the National Party's beliefs, this Court deferred to the National Party, disclaiming the authority to resolve the dispute: "it is not for the courts to mediate the merits of this dispute. For even if the State were correct, a State, or a court, may not constitutionally substitute its own judgment for that of the Party." *Id.* at 123-24.

According to *La Follette*, deference was required even if the "State were correct"—*i.e.*, even if "the public avowal of party affiliation required" by the National Party's rules "provides no more assurance of party loyalty than" Wisconsin's requiring "a person to vote in no more than one party's primary." *Id.* at 123 n.25. Yet even assuming that the National Party's rules were predicated on a false belief, the National Party retained the exclusive right to determine its methods for selecting its members: "the stringency, and wisdom, of membership requirements is for the association and its members to decide—not the courts." *Id.* Prefiguring *Dale*'s invocation of *Thomas*, this Court acknowledged that all First Amendment freedoms warrant such deference: "[A]s is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational." *Id.* at 124.

Just as the right of expressive association protects against the government's dictating to groups what their views are and which messages they can propound, *see Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 575 (1995) ("But whatever the reason, it boils down to the choice of a speaker not to

propound a particular point of view, and that choice is presumed to lie beyond the government's power to control."), RFRA does the same thing regarding a religious believer's exercise of religion—it prevents the government from telling adherents what their beliefs are and when they are violated. *See Hobby Lobby*, 134 S. Ct. at 2779 ("it is not for us to say that their religious beliefs are mistaken or insubstantial."). Furthermore, deferring to sincerely held beliefs ensures that the exercise of religion is "broadly construed" consistent with RFRA's requirements. 42 U.S.C. § 2000cc-3(g) (mandating that the exercise of religion "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution"). Not surprisingly, then, this Court has given broad deference to religious adherents regarding the sincerity of their beliefs as well as their determination that government-mandated actions conflict with these beliefs. Consistent with this Court's treatment of the right of expressive association, courts "must not be, guided by [their] views of whether the [religious objector's] teachings with respect to [a specific issue] are right or wrong." *Dale*, 530 U.S. at 661.

Thus, even assuming, *arguendo*, that the lower courts are correct—that the ACA is the legal cause of insurance issuers and TPAs providing contraceptive and sterilization coverage—under *Hobby Lobby*, *Dale*, and *La Follette*, "a court[] may not constitutionally substitute its own judgment for that of the" petitioner that sincerely believes providing notice under the Accommodation, thereby enabling coverage for morally objectionable services

and establishing an ongoing relationship with the provider of such services, contradicts its religious beliefs. *La Follette*, 450 U.S. at 123-24. Even if a court thinks that a petitioner's view (that a religious nonprofit can be morally complicit in wrongdoing even if the court declares that it is not the legal cause of the coverage) is "unwise" or even "irrational," the court "may not interfere" because the religious tenets "are for the [religious] association and its members to decide—not the courts." *Id.* at 123 n.25 and 124.

In fact, to hold otherwise would sanction a variation of the government's "too attenuated" argument in *Hobby Lobby*, an argument that this Court rejected because it impermissibly told "the plaintiffs that their beliefs are flawed." *Hobby Lobby*, 134 S. Ct. at 2778. In *Hobby Lobby*, the government argued "that the connection between what the objecting parties must do (provide health-insurance coverage for four methods of contraception that may operate after the fertilization of an egg) and the end that they find to be morally wrong (destruction of an embryo) is simply too attenuated." *Id.* at 2777 According to the government, providing coverage would not in and of itself destroy any embryo; an embryo would be destroyed only if an employee used one of the challenged methods of contraception.

The lower courts make the same general argument. On their view, the connection between what the religious nonprofits must do (provide notice under the Accommodation) and the end they believe is morally wrong (facilitating, enabling, or providing coverage for contraceptive and sterilization services) is too far removed because

the ACA, not the provision of notice, is the legal cause of the coverage. But as in *Hobby Lobby*, the religious nonprofits sincerely "believe that providing the [notice] demanded by the [Accommodation] is connected to the [provision of contraceptive coverage and, therefore, the] destruction of an embryo in a way that is sufficient to make it immoral for them to provide the [notice]." *Id.* at 2778. Although courts can determine whether the government has *coerced* religious adherents into acting contrary to *"their religious beliefs,"* *Id.*, courts cannot do what the lower courts did here—tell the religious believers that *their* views regarding moral complicity are flawed, wrong, inconsistent, or irrational: "This belief implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself [*e.g.*, signing a form] but that has the effect of enabling or facilitating the commission of an immoral act by another [*e.g.*, the provision of coverage for contraceptive and sterilization services]." *Id.* Contrary to the conclusion of the lower courts, courts are disqualified from assessing the veracity or reasonableness of such beliefs. *Smith*, 494 U.S. at 887 ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine ... the plausibility of a religious claim."); *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds.").

II. Courts Lack the Authority and Competence to Decide Religious and Philosophical Questions Regarding which Actions Make Religious Adherents Complicit in Wrongdoing under Their Faiths.

The lower courts contend that they "must ... objectively assess whether the appellees' compliance with the self-certification procedure does, in fact, trigger, facilitate, or make them complicit in the provision of contraceptive coverage" but must do so "[w]ithout testing the appellees' religious beliefs." *Geneva Coll.*, 778 F.3d at 435. This is a remarkable statement. The lower courts claim the right (and duty) to tell religious believers whether a government-mandated action actually makes them complicit in conduct that violates their sincere religious beliefs. Yet while instructing the faithful, courts are not supposed to "test" those beliefs. The problem with this view is that it requires courts to do incompatible things (like drawing a figure that is both a square and a circle): objectively assess whether an action (*e.g.*, giving notice under the Accommodation) makes a religious adherent complicit in wrongdoing without "testing" that person's (admittedly) sincere religious belief that the action *does* make her complicit in sin. In the present cases, the lower courts not only have tested the sincere beliefs of petitioners, but also have told them that their beliefs failed the test—that the Accommodation does not really make them morally culpable despite their sincere beliefs to the contrary.

Although the courts are the last arbiters of legal questions, they have no role to play regarding such

ecclesiastical issues. *See Hernandez*, 490 U.S. at 699 ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."). The lower courts have asserted an unprecedented and dangerous right to instruct the faithful about which actions actually violate their beliefs. But there are good reasons why courts are precluded from dictating the scope of moral culpability. And one need look no farther than the lower courts' "Pontius Pilate" defense to see the problem when courts assume ecclesiastical authority and pass judgment on the moral and religious claims of adherents.

According to the lower courts, religious nonprofits cannot even establish that their religious beliefs are burdened, let alone substantially burdened, because the Accommodation "washes away" their complicity in any alleged moral wrongdoing: "'The accommodation in this case consists in the organization's ... washing its hands of any involvement in contraceptive coverage, and the insurer and the third-party administrator taking up the slack under compulsion of federal law.'" *Geneva Coll.*, 778 F.3d at 441 (quoting *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 557 (7th Cir. 2014), *vacated*, *Univ. of Notre Dame v. Burwell*, 135 S. Ct. 1528 (2015)); *Id.* at 438-39 ("[T]he submission of the self-certification form does not make the appellees 'complicit' in the provision of contraceptive coverage. If anything, because the appellees specifically state on the self-certification form that they *object* on religious grounds to

providing such coverage, it is a declaration that they will *not be complicit* in providing coverage.").

Although Pontius Pilate disavowed personal responsibility by washing his hands, for at least some (including Pilate's wife) that official action did not remove his complicity in a grave moral wrong. That the courts now tell the petitioners that the Accommodation washes away their moral complicity in facilitating or enabling coverage for contraceptives does not assuage their sincere belief that giving notice violates their faith. Even if giving notice under the Accommodation declares that a religious nonprofit does not want to provide coverage directly, it does not—and cannot—control the moral complicity issue any more than Pilate's ceremonial act resolved the issue regarding his moral culpability. Rather, contrary to the lower courts' contention, these consolidated cases declare that the petitioners sincerely believe that giving notice makes them complicit, and no court has challenged the sincerity of that belief.

To contend otherwise, as the lower courts have done, is to assume the mantle of a religious authority, arrogating the power to determine (i) whether a sincerely-held religious belief is reasonable or consistent, *see Little Sisters of the Poor*, 794 F.3d at 1178 n.25 (stating that the "plaintiffs have not convincingly explained how the notice to HHS promulgated by the Departments would substantially burden their religious exercise but the notice crafted by the Supreme Court does not."), and (ii) whether such a belief is actually burdened. *See Catholic Health Care Sys. v. Burwell*, 796 F.3d 207, 217 (2d Cir. 2015) (accepting the sincerity of the plaintiffs' religious

beliefs but stating that courts "must assess the nature of a claimed burden on religious exercise to determine whether, as an objective legal matter, that burden is 'substantial' under RFRA"); *Univ. of Notre Dame*, 786 F.3d at 612 ("Although Notre Dame is the final arbiter of its religious beliefs, it is for the courts to determine whether the law actually forces Notre Dame to act in a way that would violate those beliefs.").

But this Court repeatedly has stated that in the "sensitive area" of religious belief "it is not within the judicial function and judicial competence to inquire whether the petitioner or [the courts] more correctly perceive[] the commands of [the plaintiff's] faith" because "[c]ourts are not arbiters of scriptural interpretation." *Thomas*, 450 U.S. at 716. *See also Smith*, 494 U.S. at 886 ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.").

As this Court confirmed in *Hobby Lobby*, "the federal courts have no business addressing ... difficult and important question[s] of religion and moral philosophy." 134 S. Ct. at 2778. Yet determining when and under what circumstances a religious believer is complicit in wrongdoing presents the courts with a paradigmatic question of religion and moral philosophy. *See Notre Dame*, 743 F.3d 547, 566 (7th Cir. 2014) (Flaum, J., dissenting), *vacated and remanded*, 135 S. Ct. 1528 (2015) ("Yet we are judges, not moral philosophers or theologians; this is not a question of legal causation but of religious faith."). Consequently, religious organizations (and even particular

individuals given that idiosyncratic beliefs are protected) must serve as the last arbiters of what their sincerely held religious beliefs are and whether those beliefs are countermanded by a government-mandated action or policy.

As *Thomas* demonstrates, courts have only a limited role when considering a plaintiff's professed religious beliefs. In *Thomas*, the Indiana Supreme Court concluded that Thomas's position—that he could produce the raw materials needed to build tanks but not specific parts of the tanks—was inconsistent and reflected a "personal philosophical choice rather than a religious choice." 450 U.S. at 714 (quoting *Thomas v. Review Bd.*, 391 N.E.2d 1127, 1131 (Ind. 1979)). This Court rejected the state supreme court's analysis, holding that Thomas—and not the courts—had the right to determine whether particular actions made him morally complicit: "But Thomas' statements reveal no more than that he found work in the roll foundry sufficiently insulated from producing weapons of war. We see, therefore, that Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one." *Id.* at 715. The "substantial" burden resulted from the denial of unemployment benefits, not an objective determination by the Court that working directly on the production of tanks did not make Thomas "chargeable in ... conscience." *Id.* (quoting *Thomas*, 391 N.E.2d at 1131). In fact, the Court expressly denied having the authority to decide whether a particular religious objector properly believes that an action would make him morally culpable. *Thomas*, 450 U.S. at 716.

Similarly, just last term in *Holt v. Hobbs*, this Court rejected a lower court's attempt to make an allegedly objective determination as to whether the Arkansas Department of Correction's "no beard" policy actually burdened the plaintiff's religious beliefs. The lower court (i) denied that shaving his beard really burdened the prisoner's religious exercise because he had access to a variety of other means of religious practice; (ii) determined that the burden was "slight" because his religion "would 'credit' him for attempting to follow his religious beliefs, even if that attempt proved to be unsuccessful;" and (iii) relied on the fact that not all Muslims believe that men must grow beards. 135 S. Ct. at 862. This Court rejected each part of the district court's analysis, protecting the right of religious adherents to determine what their beliefs are without having to look over their shoulders to see if courts agree. Given that the Department did not dispute the sincerity of the prisoner's belief, all the court could do under RFRA's substantial burden prong was to consider whether the "no beard" policy put the plaintiff to the choice "to 'engage in conduct that seriously violates [his] religious beliefs'" or to contravene that policy and "face serious disciplinary action." *Id.*

If a petitioner asserts a sincerely held belief that performing a certain action required by law is sinful, then the courts lack the authority to tell the religious nonprofit that its views are wrong. While courts can assess whether the penalty imposed for failing to take the required action is substantial, under this Court's precedents they cannot tell a religious practitioner that its views are wrong regardless of how novel, strange, or inconsistent

those views might seem to the court. *See Thomas*, 450 U.S. at 714 (recognizing that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection"). Because the lower courts told the petitioners "that their beliefs are flawed," this Court should reject that analysis and find that the burden on the petitioners is substantial because they confront the same penalties as Hobby Lobby and Conestoga if these religious nonprofits "conduct business in accordance with *their religious beliefs*." *Hobby Lobby*, 134 S. Ct. at 2778.

CONCLUSION

For the reasons set forth above, this Court should hold that the Accommodation imposes a substantial burden on the religious exercise of the petitioners such that the government bears the burden of satisfying RFRA's "exceptionally demanding" least restrictive means standard. *Hobby Lobby*, 134 S. Ct. at 2780.

Respectfully submitted,

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